

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

WEUSI MARRUFU McGOWAN,  
  
vs. Petitioner,  
  
M.D. BITTER,  
  
Respondent.

CASE NO. 11CV1620-LAB (PCL)

**ORDER OVERRULING  
OBJECTIONS TO REPORT AND  
RECOMMENDATION; AND**

**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS**

Petitioner Weusi Marrufu McGowan, a prisoner in state custody, filed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636, the petition was referred to Magistrate Judge Peter Lewis for report and recommendation. On April 30, 2012, Judge Lewis issued his report and recommendation (the "R&R"), which recommended denying the petition. After an extension of time to file objections, McGowan filed his objections (Docket no. 21). He then submitted additional documentation (Docket no. 23), which the Court accepted as a supplement to his objections. The supplemental materials consist of medical records showing that during 2008 and 2009, he was prescribed certain medications, apparently to treat both psychiatric and physical problems.<sup>1</sup>

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<sup>1</sup> As of June, 2009, when he pleaded guilty, the records show he was prescribed Lithobid (lithium), Seroquel (an antidepressant), a beta-blocker, a diuretic, and aspirin. The records don't show whether he was actually taking those medications nor do they reflect any side effects or unexpected reactions such as he now alleges.

1 A district court has jurisdiction to review a magistrate judge's report and  
2 recommendation on dispositive matters. Fed. R. Civ. P. 72(b). "The district judge must  
3 determine de novo any part of the magistrate judge's disposition that has been properly  
4 objected to." *Id.* "A judge of the court may accept, reject, or modify, in whole or in part, the  
5 findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The  
6 Court reviews de novo those portions of the R&R to which specific written objection is made.  
7 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). "The statute  
8 makes it clear that the district judge must review the magistrate judge's findings and  
9 recommendations de novo *if objection is made*, but not otherwise." *Id.*

10 Although McGowan filed objections, he didn't object to most of the R&R, including its  
11 factual recitations. The Court therefore **ADOPTS** them and does not recite them again here.  
12 As for McGowan's legal arguments, the R&R concluded "it is perfectly clear that Petitioner  
13 does not raise even a colorable federal claim in his Petition." (R&R, 5:9–10.) The R&R notes  
14 that, although McGowan argues it was error for the state court to sentence him without  
15 submitting certain factual issues to the jury, McGowan waived the right to jury trial in his plea  
16 agreement, and when he pleaded guilty. Although McGowan's objections repeat the R&R's  
17 recommended rulings, he doesn't challenge them or attempt to show the rulings are wrong  
18 in any way. Instead, he raises a completely new objection, *i.e.*, that he was experiencing an  
19 unexpected reaction to medication that caused him not to know what he was doing on the  
20 day he pleaded guilty. If this claim were valid and he were entitled to relief, the proper  
21 remedy would not be vacatur of McGowan's sentence and remand for resentencing, which  
22 is the remedy he seeks; rather, he would be entitled to withdraw his guilty plea and go to  
23 trial. He is not, however, entitled to any relief.

24 This new claim was never raised before the state court and is therefore unexhausted.  
25 (See Lodgments 2 (petition to California Superior Court), 4 (petition to California Court of  
26 Appeal), and 6 (petition to California Supreme Court).) For this reason alone, the objection  
27 must be overruled. See 28 U.S.C. § 2254(b)(1) (requiring exhaustion). McGowan never  
28 sought to withdraw his plea, and has questioned its voluntariness until now. In fact, the issue

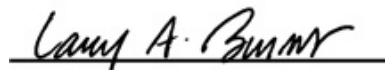
1 was not even raised in the petition filed in this Court. Furthermore, it is contradicted by  
2 evidence presented in the state court, and by the trial court's factual findings.

3 At McGowan's plea hearing, McGowan stated (under penalty of perjury) that he was  
4 entering his plea freely and voluntarily (Lodgment 1 at 59 ("I am entering my plea freely and  
5 voluntarily . . . ."); and that his judgment was unimpaired (*Id.* ("I am sober and my judgment  
6 is not impaired. I have not consumed any drug, alcohol or narcotic within the past 24 hours."))  
7 Each statement was initialed by him and made under penalty of perjury. (*See id.* at 61  
8 (declaration under penalty of perjury).) The state court made the factual finding that  
9 McGowan understood and was voluntarily waiving his constitutional rights, and that his plea  
10 and admissions were freely and voluntarily made. (*Id.*) These statements (which he made  
11 on June 19, 2009 and which his counsel verified the same day) and findings (which the trial  
12 court made on June 22, 2009) were not unreasonable and are not rebutted by the thin  
13 evidence he now presents. *See* 28 U.S.C. § 2254(e)(1) (state court's factual determination  
14 presumed correct, and petitioner bears burden of rebutting presumption by clear and  
15 convincing evidence). Even if McGowan had exhausted this issue and raised it in his petition  
16 to this Court, it would be rejected as meritless.

17 McGowan's objections to the R&R are therefore **OVERRULED**. The Court has  
18 reviewed the R&R, finds it to be correct, and **ADOPTS** it. The petition is **DENIED**. Because  
19 jurists of reason would not find this decision debatable, *see Slack v. McDaniel*, 529 U.S. 473,  
20 484 (2000), the certificate of appealability is also **DENIED**.

21  
22 **IT IS SO ORDERED.**

23 DATED: June 11, 2013

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25 **HONORABLE LARRY ALAN BURNS**  
26 United States District Judge  
27  
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